No. 11171

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RAYTON GEORGE SCHULTZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

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No. 11171

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KENTON GEORGE SCHULTZ,

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Statement of Facts.

The defendant was indicted on July 11, 1945 [R. 4], by the Grand Jury for the Southern District of California at Los Angeles. The indictment contained two counts [R. 2, 3, 4]. Therein the defendant was accused in each count of having violated the Selective Training and Service Act of 1940 (U. S. C. A. Title 50, Appendix, Section 311). He was arraigned in the Northern Division at Fresno, California, and entered his plea of not guilty to each of the two counts. In October, 1945, the case came on for trial at Fresno. Prior to the commencement of the trial, the District Court, upon the motion of the United States Attorney, dismissed the first count of the indictment over the protest and objection of the defendant [R. 4, 5]. An exception was allowed to the ruling of the Court granting

the dismissal of the first count [R. 5]. He was then tried to a jury on the second count. The defendant was convicted on the 10th day of October, 1945. A motion in Arrest of Judgment was filed [R. 4, 5]. It was argued on the 22nd and 23rd days of October, 1945. The motion was denied on October 23, 1945 [R. 8] and the Court thereupon sentenced the defendant to a prison term of eighteen (18) months [R. 9].

The first count of the indictment accuses the defendant in substance as follows:

> ". . . that said defendant did at said time and place *knowingly and unlawfully* fail and neglect to perform a duty . . . that is to say, the defendant did then and there *knowingly and unlawfully* fail and neglect to report for induction into the armed forces of the United States, as so notified and ordered to do. . . ." (Emphasis supplied.)

Count Two (2) accuses the defendant as follows:

> ". . . the said defendant did *knowingly* fail and neglect to perform a duty required of him under said Act and the rules and regulations promulgated thereunder, in that he did then and there *knowingly* fail and neglect to keep said Local Board No. 129 advised of the address where mail would reach him. . . ." (Emphasis supplied.)

The second count omits the word *"unlawfully"*, which is used twice in the first count. The second count, in effect, simply accuses the defendant of *"knowingly"* having failed and neglected to keep the local board advised of the address where mail would reach him.

Assignment of Errors and Points Upon Which Appellant Relies in This Appeal.

I.

THE MOTION IN ARREST OF JUDGMENT SHOULD HAVE BEEN GRANTED AND ALLOWED. THE SECOND COUNT OF THE INDICTMENT ON WHICH THE DEFENDANT WAS TRIED AND CONVICTED FAILS TO STATE AN OFFENSE.

II.

THE DISTRICT COURT ERRED IN ITS OPINION, DECISION AND DETERMINATION IN DENYING THE MOTION IN ARREST OF JUDGMENT.

I.

The Motion in Arrest of Judgment Should Have Been Granted and Allowed. The Second Count of the Indictmnt on Which the Defendant Was Tried and Convicted Fails to State an Offense.

The United States Attorney, and the District Court have considered only the first sentence of the regulation, as follows:

> "It shall be the duty of each Registrant to keep his Local Board advised at all times of the address where mail will reach him."

They have failed to consider this regulation as a whole. They fell into the error of completely misapprehending its meaning and effect, and, therefore, of assuming that the regulation imposed the duty of keeping the Board advised from day to day of Registrant's whereabouts and that the failure to do so constituted an offense.

The reading of the regulation as a whole in the light of the Selective Training and Service Act of 1940, its pro-

visions and purposes, makes quite clear the fact that the regulation had one purpose and effect and one only. That purpose and effect was to advise the Registrant that the Board would rely in sending out its communications upon the address last given and if he did not want to continue to use that address, he should advise it of any change. It had neither the purpose nor the effect of making it an offense for the Registrant to stick to his original address.

This is the regulation in whole:

> 641.3 *Communication by mail.* It shall be the duty of each Registrant to keep his local Board advised at all times of the address where mail will reach him. *The mailing of any order, notice, or blank form by the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."* (Emphasis supplied.)

What it intends to, and does, accomplish, is this: When the registrant gives his address at the time of registration, he must expect that address to serve as the one for the Board to communicate with him by, and if he doesn't notify the Board of a change of address, he must expect to be bound by notices sent to that address whether he receives them or not, and to abide the consequences of their sending though they were not received. Thus the regulation puts the responsibility for his failure to actually receive notices upon the registrant and not upon the Board, and it instructs him that if he wants to be sure that he will actually and not merely constructively receive notices, he must keep the Board advised of change of address. At the same time, it tells him that his last reported address will be a sufficient address for all the purposes of the Board and that the mailing of any order or communication to the last address given by him shall constitute notice to him and lay

him liable for prosecution for failure to obey it whether or not he actually receives the notice. If in this case the Board mailed his notice of induction to the last address he gave, he would have been without defense to the first count for, constructively presumed to have received his notice, he was under the imperative duty to report for induction at the time named in it, and apparently he did not report.

But before the commencement of the trial, on the Motion of the United States Attorney, the first count accusing the defendant of having "knowingly and unlawfully" failed to report for induction was dismissed by the District Court.

The charge made against him under the second count that he did not keep the Board advised of an address where mails could reach him states no offense at all. For the regulation invoked expressly provided that the Board will always mail to his last address given, and that he will be conclusively presumed to have received notices sent by the Board to that address. Any failure, therefore. to keep the Board advised of a change of address is not a failure of duty for which he can be indicted as a criminal, it is merely a failure of self protection as a result of which he may find himself subject to indictment as a criminal for failure to obey an order or communication, notice of which he did not actually receive. Yet he was prosecuted, nevertheless, and convicted. The Motion in Arrest of Judgment should have been granted by the District Court and Count Two dismissed as charging no offense, and even if a felony offense could be pleaded for failure to keep his local Board advised at all times of the address where mail would reach him, Count Two utterly fails to accuse him of criminal intent so to do.

II.

The District Court Erred in Its Opinion, Decision and Determination in Denying the Motion in Arrest of Judgment.

The second count of the indictment accuses the defendant as follows:

> ". . . the said defendant did *knowingly* fail and neglect to perform a duty required of him under said act and the rules and regulations promulgated thereunder, in that he did then and there *knowingly* fail and neglect to keep said Local Board No. 129 advised of the address where mail would reach him. . . ."

No reported decision has been found in any of the Circuit Courts nor in the Supreme Court approving a felony indictment which omitted all of the words "feloniously", "willfully" and "unlawfully" and contained merely "knowingly". The courts speak of "knowingly" because that is the only one of those four words which is contained in the statute and the regulations. But elsewhere in the decisions, if the actual language of indictments is quoted, we find that in every instance the words "unlawfully" or "willfully" appear in the body of all of the felony indictments. More often the words are "willfully", "unlawfully" and "knowingly". Sometimes all four appear, *i. e.* "feloniously", "willfully", "unlawfully" and "knowingly".

Mr. Justice Reed in delivering the opinion of the Court in:

> *Bartchy v. United States,* decided June 7, 1943, 319 U. S. 484,

states in the opening paragraph of that opinion:

> "This case presents the question of the sufficiency of the evidence to support petitioner's conviction under Section 11 of the Selective Training and Service

Act and the regulations made thereunder for a *knowing* failure to keep his local board advised of the address where mail would reach petitioner, a registrant under the Act. . . . Certiorari was granted because the conviction involved an interpretation of an important regulation under the Selective Service Act; 318 U. S. 754, *ante,* 1129, 63 S. Ct. 980."

"With the approval of both parties and the Court, petitioner was tried by the Court without a jury and upon conviction was sentenced to imprisonment for sixty days. The Circuit Court of Appeals *affirmed,* one judge dissenting." (Emphasis supplied.)

Mr. Justice Reed does not mention the form of, nor quote the language of, the body of the Indictment, probably because the Court concluded to reverse the conviction on the insufficiency of the evidence.

The "one judge dissenting" in the Circuit Court of Appeals, 5th Circuit, Circuit Judge Hutcheson, states in his vigorous and lucid dissent as follows:

"The second count charged that the defendant was registered with Local Draft Board No. 9 . . . (and) . . . that it was his duty to keep the draft board advised at all times of the address where mail would reach him, and that, in violation of that duty, he *knowingly, willfully* and *feloniously* did fail and neglect to keep the local draft board so advised." (Emphasis supplied.)

Bartchy v. United States, decided December 23, 1942 (C. C. A. 2nd), 132 F. (2d) 348 at page 349,

and Circuit Judge Hutcheson proceeds in his dissenting opinion at page 349 to say:

"Defendant demurred to the indictment and each count thereof. The demurrers overruled, he pleaded

not guilty, and upon his request with the approval of the Court and the United States Attorney, a jury was waived and all questions of fact as well as law were submitted to the Court. . . . Appellant is here insisting that his demurrer to count two of the indictment was well taken and that that count should have been dismissed. He makes the further insistence that, the evidence, without conflict, every fact testified to consistent with every other fact, no witnesses disputing the testimony of any other, the facts thus disclosed are wholly insufficient to establish beyond a reasonable doubt that appellant failed to keep his local draft board advised at all times of the address where mail would reach him. I think it *clear beyond any possibility of doubt both* that the *second count* of the *indictment states no offense and that, if it does,* the evidence fails to establish its commission." (Emphasis supplied.)

Judge Hutcheson's dissent was approved by the Supreme Court as to his latter expression, to-wit: "the evidence fails to establish its Commission" but unfortunately the Supreme Court is silent concerning the sufficiency of the second count of the indictment which the petitioner and Judge Hutcheson claimed "states no offense." The Supreme Court tactfully refrained from expressing either approval or disapproval of the form of sufficiency of the indictment.

We call Judge Hutcheson's statement to the attention of this court to illustrate that the indictment charged Bartchy, the petitioner, with criminal intent by the allegations *"knowingly", "willfully"* and *"feloniously"* coupled with the allegations of fact. Yet a first reading of Mr. Justice Reed's very first paragraph in the decision of *Bartchy v. United States, supra,* would tend to mislead a

person into believing that the Bartchy indictment simply accused Bartchy of "knowingly" having failed, etc. Whereas, in truth and in fact, according to Judge Hutcheson all three words, *"knowingly"*, *"willfully"* and *"feloniously"* were a part of the body of that indictment. It is hoped that a certified copy of the indictment in the *Bartchy* case can be produced by the Appellant in Court at the hearing of this appeal.

Judge Hutcheson further states in the same dissenting opinion at p. 350:

> "The Government, the District Judge, and the majority considering only the regulation, 'It shall be the duty of each Registrant to keep his local board advised at all times of the address where mail will reach him', and failing to consider it as a whole, fell into the error of completely misapprehending its meaning and effect, and therefore, of assuming that the regulation imposed the duty of keeping the Board advised from day to do so constituted an offense."

The Supreme Court does not adopt that language of Judge Hutcheson but at page 489 of the *Bartchy* decision states:

> "The District Court and the Court of Appeals concluded that the petitioner had not shown diligence in keeping the board advised of his whereabouts and had *affirmatively* endeavored to avoid delivery of the communication. We do not think either of these inferences is justified by the record." (Emphasis supplied.)

The Supreme Court in the *Bartchy* decision concludes by stating:

> "Petitioner might have been more diligent by telephoning or calling at the union at intervals between the twenty-fifth of February and the tenth of March

but *we conclude that he was justified in relying upon the efficiency of this experienced organization* to advise him of *the arrival of the notice. Reversed.*" (Emphasis supplied.)

Following the reversal by the Supreme Court the reports are silent as to any further attempted prosecution of Mr. Bartchy. Probably the indictment was dismissed and the registrant allowed to accept voluntary induction into the armed forces of the United States.

In *U. S. v. Cruikshank* (92 U. S. 542, 557, 558, 23 L. ed. 588) the Supreme Court said:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In U. S. v. Mills, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crimes with which he stands charged;' and in U. S. v. Cook, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms, as in the definition; but it must state the species,—*it must descend to particulars.*' (1 Arch. Cr. Pr. and Pl., 291.) The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the *facts*

alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, *facts are to be stated, not conclusions of law alone.* A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and *circumstances.*"

"It is a crime to steal goods and chattels; but an indictment would be bad that did not *specify with some degree of certainty the articles stolen.* This, because the accused must be advised of the essential particulars of the charge against him, and *the court must be able to decide whether the property taken was such as was the subject of larceny.*" (Emphasis supplied.)

As stated in *U. S. v. Cruikshank, supra,* "It is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—*it must descend to particulars.*" There is no allegation in Count Two of this indictment to inform the defendant that he is accused of failing to furnish a new address subsequent to his registration with the local board. As far as the allegations in the indictment are concerned, he may have furnished a chain of new addresses, as in the *Bartchy* case. The United States Attorney was certainly in possession of the facts prior to the drafting of the indictment. If these facts indicated that the defendant, KENTON GEORGE SCHULTZ, "willfully" attempted to delay his induction into the armed forces of the United States by a scheme, either of giving false addresses, or of no addresses at all, then he should have been accused accordingly. The indictment should have included some of these facts or, if the pleader preferred to use legal conclusions, then he should have, at least, inserted the word "willfully". It

is for that reason that felony pleadings have contained the words "feloniously", "willfully", "unlawfully" and often other legal conclusions in addition to detailed facts as to time, place and circumstances. Such allegations accuse the defendant of criminal intent. All of these allegations are often contained in felony indictments in addition to the simple recitation of the language of the statute creating the offense.

We truly believe, and we contend, that the omission of the word "unlawfully" in the second count of the indictment, after it was used twice in the first count of the indictment, must have been an omission by oversight or a mistake of the typist. We do not think that the United States Attorney deliberately included the word "unlawfully" twice in the first count of the indictment and then with deliberation studiously avoided its use in the second count. However, if the Government should take the position that the word was omitted purposely, then it is an indication of a plan on the part of the pleader to avoid his duty to descend to particulars with allegations of fact which could replace the usual legal conclusions "willfully" and "unlawfully". If the Government takes that position, it would indicate that the Government elected to dismiss the first count of the indictment and to rely upon the second count because it became easier to convict with the word "unlawfully" omitted. The word "unlawfully" may be the equivalent of the word "willfully".

Certainly doing a thing "knowingly and willfully" implies not only knowledge of the thing but a determination with an evil intent to do it or to omit doing it.

Hiatt v. Tomlinson, 100 Neb. 51, 158 N. W. 383, 384.

With respect to liability for punishment for contempt, doing or omitting to do a thing "knowingly and willfully" implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it.

> *State ex rel. Grove v. Grove,* 158 Oregon 635, 77 P. (2d) 430, 432.

The court in the *"per curiam"* opinion of:

> *United States v. Trypuc,* decided June 11, 1943 (C. C. A. 2nd), 136 F. (2d) 900,

at page 901 says:

> "But an examination of the charge convinces us that the issue whether the appellant 'knowingly' failed to keep the board advised of an address where mail would reach him was not properly submitted to the jury."

The fact is that in the very same opinion it becomes crystal clear (first paragraph) that the indictment in that case contained the word "unlawfully" as well as "knowingly".

"The indictment charged that being under such duty, the appellant did 'unlawfully and knowingly' fail and neglect to perform it." *United States v. Trypuc* (*supra*). The conviction in the *Trypuc* case was reversed upon the authority of *Bartchy v. United States* (*supra*).

The conviction obtained under the second count in the instant case without a correct and requisite allegation of criminal intent is erroneous and in violation of Amendment VI of the Constitution.

Conclusion.

It is true that criminal pleadings in the United States courts are being simplified from time to time, or perhaps they are being "streamlined". No defendant can quarrel with the Government over a simplified or a "streamlined" indictment provided the indictment contains allegation of facts lucidly, succinctly and completely stated which accuse and inform him fully of the "nature and cause of the accusation". With respect to simplified criminal pleadings, however, it is well to recall to mind the words of Mr. Justice Bradley in deciding the case of *Boyd v. U. S.,* 116 U. S. 616, 29 L. Ed. 746 at p. 752, where he declared:

> "It may be the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of *persons* and property should be liberally construed. . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *'obsta principiis'.*" (Emphasis supplied.)

The Latin phrase *"obsta principiis"* was uttered almost nineteen centuries ago by the Roman poet Ovid. The present day English equivalent probably is "Withstand Beginnings".

Before we begin to attempt in the United States Courts to plead criminal intent with one single legal conclusion, "knowingly", without, in addition, descending to particulars and alleging facts as to the circumstances of the alleged criminal act, we should apply soberly the motto:

"obsta principiis". Surely it was not the intention of the Congress in passing the Selective Training and Service Act of 1940 to create felons but to mobilize a military force in defense of our beloved country. Citizens must not be permitted to lose their civil rights and become branded as common felons simply to uphold simplified or "streamlined" indictments which wholly fail to state any offense. Let all of us "withstand beginnings" in the disintegration of Constitutional rights by discharging our Constitutional duties.

No man, under our Constitution, is guilty of a felony unless he has acted with an exercise of his free will and has "willfully" committed a felonious crime. Consequently, the felony indictments in the United States Courts have uniformly contained, at the very least, the legal conclusion "willfully" or its equivalent by a recitation of facts. Acts alone are not in themselves sufficient. The Acts must be accompanied by accusations of criminal intent. It must appear in the body of a felony indictment that the accused acted with criminal intent or with a wicked or bad purpose.

The District Court erred in denying the Motion in Arrest of Judgment. The judgment and sentence was based upon the fatally defective and insufficient second count of the indictment. No criminal intent is pleaded therein either by legal conclusion or by recitation of facts to show criminal intent or a wicked or bad purpose.

Yet the appellant faces eighteen months in an institution of the penitentiary type.

The judgment should be reversed.

Respectfully submitted,

MAURICE NORCOP,
Attorney for Appellant.

APPENDIX.

Section 11 of the Selective Training and Service Act punishes with a maximum of five years imprisonment and a fine of not more than $10,000.00 "any person . . . who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act. . . ." (September 16, 1940), 54 Stat. 885, 894, c. 720, 50 USCA Appx. 311, 11 FCA title 50, Appx. 5, 11.

The regulation involved provides: "Section 641.3 *Communication by mail.* It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not." 6 Fed. Reg. 6851-52."